

**FINAL
SAFETY AND HEALTH CODES BOARD
MEETING MINUTES
THURSDAY, March 3, 2016**

BOARD MEMBERS PRESENT: Mr. Jerome Brooks
Mr. Lou Cernak, Jr.
Mr. John Fulton
Mr. Chris Gordon
Ms. Anna Jolly
Mr. David Martinez
Mr. Travis Parsons
Mr. Kenneth Richardson, II
Ms. Milagro Rodriguez, Chair
Mr. Chuck Stiff, Vice Chair
Mr. Tommy Thurston

BOARD MEMBERS ABSENT: Mr. Courtney Malveaux

STAFF PRESENT: Mr. C. Ray Davenport, Commissioner of Dept. of Labor & Industry
Mr. Bill Burge, Assistant Commissioner
Mr. Jay Withrow, Director, Legal Support, BLS, VPP, ORA, OPP & OWP
Mr. Ron Graham, Director, VOSH Health Compliance
Ms. Jennifer Rose, Director, VOSH Safety Compliance
Mr. Ed Hilton, Director, Boiler Safety Compliance Management
Mr. John Crisanti, Manager, Office of Policy and Planning
Ms. Diane Duell, Director, Legal Services
Mr. Warren Rice, Director, Consultation Services
Ms. Deonna Hargrove, Consultation Program Manager
Ms. Regina Cobb, Senior Management Analyst
Ms. Cathy Brown, Program Support Technician, Senior

OTHERS PRESENT: Ms. Lori J. Krenik, Court Reporter, Halasz Reporting & Videoconference
Joshua Laws, Esq., Assistant Attorney General, OAG
Ms. Beverly Crandell, Safety Program Coordinator, Tidewater
Community College

ORDERING OF AGENDA

Chair Milly Rodriguez called the meeting to order at 10:00 a.m. A quorum was present.

Ms. Rodriguez requested a motion to approve the Agenda. Mr. Kenneth Richardson moved to accept the Agenda, and Mr. Tommy Thurston properly seconded the motion. The Agenda was approved, as submitted, and the motion was carried by unanimous voice vote.

APPROVAL OF MINUTES

Ms. Rodriguez asked the Board for a motion to approve the Minutes from the October 29, 2015, Board meeting. On proper motion by Ms. Anna Jolly and seconded by Mr. Chuck Stiff. The Minutes were approved by unanimous voice vote.

PUBLIC COMMENTS

Ms. Rodriguez opened the floor for comments from the public, however, there were no comments.

OLD BUSINESS

Proposed Amendments to the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program

Mr. Jay Withrow, Director of Legal Support, BLS, VPP, ORA, OPP & OWP for the Department, began by requesting the Board to consider for adoption, as a proposed regulation of the Board, the proposed language in the Amendment to the Administrative Regulation for the VOSH Program, 16VAC25-60, *et seq.* He then reminded the Board of the regulatory history of these proposed amendments. He stated that rather than reading the entire package, instead he would highlight some issues.

He started by briefly discussing item No. 1 of the briefing package which deals with §16VAC25-60-130. He stated that this amendment would allow VOSH to enforce the Virginia Department of Transportation Work Area Protection Manual, in lieu of the federal Manual on Uniform Traffic Control Devices (MUTCD), an OSHA regulation which has been issued for years. He informed the Board that, when the regulation was drafted, much language in it is references that employers “should” do this or you “may” do that. He stated that VDOT developed its own version of the manual – the Work Area Protection Manual - the use of which is required in their contracts with employers. The proposal from our regulation would allow our Department to enforce the Virginia Work Area Protection Manual in a situation where there is a contract either with VDOT or a locality that says you are required to comply with the Virginia manual.

He stated that item Number 2 of the briefing package clarifies whistleblower anti-retaliation safeguards for public sector employees other than the Commonwealth and its agencies, e.g., political subdivisions such as city and county governments.

He continued by stating that in item Number 3 one of the purposes of the Administrative Regulation Manual (ARM) is to address public sector coverage issues, government employees and employers. He added that there is a statute in the Virginia Code that states that our code sections and regulations only apply to public sector employers to the extent that the Board or Commissioner by regulation applies them, so the Department has to go through and look at any of the specific code sections that the Department wants to apply to the public sector. The Department has to list them in the ARM. He added that the second part of this item is to obtain administrative search warrants. He stated that the Department gets overwhelming cooperation from local governments, but if they refused the Department entry to a work site, the Department would have to get a search warrant, and this amendment allows the Commonwealth’s Attorney to do that.

He stated that item Number 4 provides some clarification when seeking to resolve whistleblower anti-retaliation cases involving the Commonwealth and its agencies. He informed the Board that Number 5 clarifies the releasable documents under the Freedom of Information Act (FOIA). These provisions are identical to the provisions OSHA follows in its VPP program. With respect to Number 6, Mr. Withrow explained that this is a very minor change to now describe the Department's anti-discrimination cases as whistleblower cases, a change that OSHA made.

He explained that Item Number 7 concerns whistleblower as well, clarifying that the Commissioner may request penalties that would be paid to the employee for occupational whistleblower discrimination or anti-retaliation cases at the litigation state. He stated that Number 8 clarifies in 16VAC25-60-245 the Commissioner's authority to take and preserve testimony, examine witnesses and administer oaths constitutes an administrative subpoena power.

He informed the Board that items Numbers 9 and 10 have to do with some legal issues and the burden of proof in VOSH cases. He added that this amendment establishes in regulation that the burden of proof is by a preponderance of the evidence. Also, item Number 10 addresses the burden of proving an affirmative defense citation that lies with the defendant.

Mr. Withrow stated that there was no cost impact associated with the ten item previously discussed. He admitted that for item Number 1, the VDOT issue, there is some impact in that now employers would be subject to citation under the new regulation that they would not have been cited under the old regulation. He added that this does not involve a large number of instances because the Department does not cite work zone construction very often, but there is a potential for that. He also added that VDOT requires employers to sign a contract in which employers agree to accept financial responsibility. He stated that for items Numbers 2 - 6, 8 and 10, there was no additional cost impact on employers. He stated that a financial burden on the employer would be imposed with respect to item Number 7, which was the issue of where the Department could go in a whistleblower case which goes to the judge for litigation and additional penalties against the company is requested to be assessed. He admitted that whistleblower cases that actually go to court are very rare, averaging less than one per year.

Mr. Withrow informed the Board that employees would benefit from more protections from the VDOT regulations and from the whistleblower provision if additional penalties encourage employers to comply with the Department's regulation and the anti-discrimination law. He added that he did not believe there will be any adverse impact on employees from the proposed amendments. With respect to impact on the Department, he stated that, other than training the Department's employees on changes to the regulations, there would not be any additional physical or programmatic impacts involved.

When asked how many whistleblower cases the Department investigates, Mr. Withrow responded that the Department receives approximately 100 to 125 complaints a year, but the Department only investigates about 25 to 30 of those. He continued by stating that the Department receives many complaints that are not in our jurisdiction, and that are covered by a federal agency or the complaints are not safety and health-related, but are discrimination complaints based on race, sexual orientation or other types of discriminatory actions that the Department does not cover.

In conclusion, Mr. Withrow recommended that the Board consider for adoption, as a proposed regulation of the Board, the proposed amendments to the Administrative Regulation for the VOSH Program, 16VAC25-60, *et seq.*, in accordance with the authority of the Board under §40.1-22(5) and the requirements of the Administrative Process Act, §2.2-4000, *et seq.*, of the Code of Virginia.

A motion to accept the Department's recommendation was properly made by Mr. Stiff and seconded by Ms. Jolly. The motion was approved unanimously by voice vote.

Proposed Regulation on Virginia Voluntary Protection Programs (VPP), 16VAC25-200

Mr. Withrow began by providing the regulatory background for this proposed regulation which was approved by the Governor on October 30, 2015 and published in the Virginia Register on November 30, 2015, with a 30-day public comment period which ended on December 31, 2015. No comments were received. He then requested the Board to consider for adoption as a proposed regulation of the Board the Proposed Regulation on Virginia Voluntary Protection Programs (VPP), 16VAC25-200.

He summarized the proposed regulation by stating that on March 19, 2015, the Virginia General Assembly approved the adoption of §40.1-49.13 of the Code of Virginia which codified the VOSH Voluntary Protection Program (VPP). Subsection B of §40.1-49.13 requires the Board to adopt a VPP regulation which addresses the following issues: scope, purpose, and applicability; definitions; categories of participation; ways to participate; application requirements; comprehensive safety and health management system requirements; certification and re-certification processes; on-site evaluations; annual submissions; other participation requirements; enforcement activity at VPP sites; and withdrawal or termination.

He then informed the Board that Virginia's VPP was instituted in 1996 and is patterned after federal OSHA's VPP which was originally created in 1992. He added that an employer's membership in VPP is recognized as the nation's and Virginia's highest award that can be bestowed by a government agency to an employer for excellence in occupational safety and health management systems. Traditional VPP has two levels: Star worksite and Merit worksite which he explained in detail.

He stated that the purpose of this proposed change is to adopt definitions, rules, regulations, and standards required by Virginia Code § 40.1-49.13.

With respect to impact of the proposed regulation on employers, Mr. Withrow stated that VPP is a voluntary program so there is no negative impact on Virginia employers that are not participants of the program. He added that program participants do incur costs associated with developing and implementing safety and health management systems that often exceed current VOSH laws, regulations, and standards. However, the costs are incurred on a voluntary basis. The Department tracks injury and illness rates for each VPP site on an annual basis.

He stated that VPP sites regularly report decreased bottom line expenditures, which are associated with both drastically reduced injury and illness rates, and improved productivity and employee morale. VPP is available to private and public sector employers of all sizes. Virginia was the first VPP in the country to recognize state correctional institutions as VPP members – Augusta and Lunenburg Correctional Facilities of the Virginia Department of Corrections (VADOC).

He mentioned that Virginia's VPP has recognized a total of 66 Star worksites since the program began in 1996. He added that VPP participation benefits employees by enhancing workplace safety and health practices; reducing workplace injuries and illnesses and the associated workers' compensation and medical costs; and improving employee morale. VPP participation encourages active employee involvement in safety and health. He also stated that expanding Virginia's VPP will promote safer and

healthier work places in Virginia by using a proactive, cooperative approach between employers, employees and Virginia government.

In conclusion, Mr. Withrow requested the Board to consider for adoption, as a proposed regulation of the Board, the Proposed Regulation on Virginia Voluntary Protection Programs (VPP), 16VAC25-200, in accordance with the authority of the Board under §40.1-22(5) and the requirements of the Administrative Process Act, §2.2-4000, *et seq.*

A motion to accept the Department's recommendation was properly made by Mr. Travis Parsons and seconded by Mr. Stiff. The motion was approved unanimously by voice vote.

NEW BUSINESS

Electrical Safety-Related Work Practices, §1910.331 (Subpart S –Electrical); Electric Power Generation, Transmission, and Distribution, 1910.269 (Subpart R – Special Industries); General, 1926.950 (Subpart V – Power Transmission and Distribution); and Working On or Near Exposed Energized Parts, 1926.960 (Subpart V – Power Transmission and Distribution); Corrections

Ms. Jennifer Rose, VOSH Safety Compliance Director for the Department of Labor and Industry, requested that the Board consider for adoption the Corrections to the Electrical Safety-Related Work Practices, §1910.331 (Subpart S –Electrical); Electric Power Generation, Transmission, and Distribution, 1910.269 (Subpart R – Special Industries); General, 1926.950 (Subpart V – Power Transmission and Distribution); and Working On or Near Exposed Energized Parts, 1926.960 (Subpart V – Power Transmission and Distribution), as published on October 5, 2015 in 80 FR 60033.

Ms. Rose summarized the corrections by stating that they will provide additional clarification regarding the applicability of the standard to certain operations, including some tree trimming work that is performed near, but that is not on or directly associated with, electric power generation, transmission, and distribution installations. She added that minor errors in two minimum approach distances tables in the general industry and construction standards for electric power generation, transmission and distribution work also were corrected. She then explained in detail each of the corrections that federal OSHA made, for example, expressly limiting the scope of §1910.269 as it relates to line-clearance tree trimming. She informed the Board that the standard applies to line-clearance tree trimming only to the extent it is performed for the purpose of clearing space around electric power generation, transmission, or distribution lines or equipment and on behalf of an organization that operates, or that controls the operating procedures for those lines or equipment.

Ms. Rose also detailed other corrections, such as: a note was added to the definition of "line-clearance tree trimming" in §1910.269(x), with corresponding revisions to Note 2 to the definition of "line-clearance tree trimmer" to explain the scope of §1910.269; replacing terms such as "line-clearance tree-trimming operations" and "line-clearance tree-trimming work" wherever they appear in 1910.269 and Subpart V of Part 1926 with "line-clearance tree trimming"; referencing the scope of §1910.269 in Note 3 of §1910.331(c)(1); and correcting minor errors in various Tables in Subpart V of Part 1926.

Ms. Rose described the history of §§1910.331 through 1910.335, the Electrical Safety-Related Work Practices Standard for General Industry, and of §1910.269, the Electric Power Generation, Transmission, and Distribution standard in 1994. She explained OSHA's conclusion that the language in the existing standards did not convey its intent with respect to tree-trimming activities that meet the definition of

“line-clearance tree trimming,” but that are not directly associated with electric power generation, transmission, or distribution lines or equipment

She explained that in 2014 tree care industry representatives raised questions that led OSHA to believe that the industry was unclear about the application of §1910.269, with respect to certain tree-trimming work. As a result, OSHA examined the relevant regulatory language in the general industry standards on Electrical Safety-Related Work Practices in Subpart S and on Electric Power Generation, Transmission and Distribution work, §1910.269, and determined that the scope provisions in §1910.331 did not accurately explain the applicability of the Electrical Safety-Related Work Practices at §§1910.331 through 1910.335 to qualified persons performing work near, but not on or directly associated with, the installations listed in §1910.331(c)(1) through (c)(4), including electric power generation, transmission, and distribution installations. As a result, OSHA made the necessary corrections to provide improved clarity.

Ms. Rose added that, other than improved clarity, no significant impact is anticipated on employers, employees or the Department with the adoption of these corrections.

In conclusion, she requested that the Board adopt the corrections to Electrical Safety-Related Work Practices, §1910.331 (Subpart S –Electrical); Electric Power Generation, Transmission, and Distribution, 1910.269 (Subpart R – Special Industries); General, 1926.950 (Subpart V – Power Transmission and Distribution); and Working On or Near Exposed Energized Parts, 1926.960 (Subpart V – Power Transmission and Distribution), with an effective date of June 15, 2016.

A motion to accept the Department’s recommendation was properly made by Mr. Parsons and seconded by Mr. Stiff. The motion was approved unanimously by voice vote.

Notice of Intended Regulatory Action for Amendments to 16VAC25-50, Boiler and Pressure Vessel Rules and Regulations

Mr. Ed Hilton, Director of the Boiler Safety Compliance Program for the Department of Labor and Industry, requested the Board to authorize the Department to initiate the regulatory process to amend 16VAC25-50, Boiler and Pressure Vessel Rules and Regulations, by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act, §2.2-4007.01.

Mr. Hilton described the amendments which included adopting the latest Editions of the following publications: Boiler and Pressure Vessel Code, ASME Code; ANSI/NB National Board Inspection Code (NBIC), National Board of Boiler and Pressure Vessel Inspectors; B31.1, ASME Code for Power Piping, American National Standards Institute; NFPA 85, Boiler and Combustion Systems Hazards, National Fire Protection Association; Part CG (General), Part CW (Steam and Waterside Control) and Part CF (Combustion Side Control) Flame Safeguard of ANSI/ASME CSD-1, Controls and Safety Devices for Automatically Fired Boilers, American Society of Mechanical Engineers; and API 510, Pressure Vessel Inspection Code, Maintenance Inspection, Rating, Repair and Alteration, American Petroleum Institute.

He explained the basis for this intended regulatory action is to provide both increased protection of human life and property from the unsafe or dangerous construction, installation, inspection, operation, and repair of boilers and pressure vessels in the Commonwealth of Virginia by complying with the most recent editions of industry required guidance documents.

He informed the Board that the purpose of the NOIRA is to conform to the most current editions of NFPA, ASME and National Board safety and inspection codes. With respect to impact, Mr. Hilton stated that adopting the latest editions of the various codes will cause little impact on employers who are already required to comply with the Codes. He noted that a major change would be the requirement in the NBIC for signage and metering for CO₂ tank installations. No negative impact is anticipated for employees or the Department.

Mr. Hilton concluded by requesting the Board to authorize the Department to initiate the regulatory process to amend 16VAC25-50, Boiler and Pressure Vessel Rules and Regulations, by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act, §2.2-4007.01.

A motion to accept the Department's recommendation was properly made by Mr. David Martinez and seconded by Mr. John Fulton. The motion was approved unanimously by voice vote.

Report of Periodic Review of Certain Existing Regulations

Ms. Regina Cobb, Senior Management Analyst for the Department of Labor and Industry, requested the Board's permission to proceed with the periodic review process for the following four regulations:

1. 16VAC25-11, Public Participation Guidelines;
2. 16VAC25-50, Boiler and Pressure Vessel Rules and Regulations;
3. 16VAC25-160, Construction Industry Standard for Sanitation; and
4. 16VAC25-180, Virginia Field Sanitation Standard, Agriculture.

She explained that the Administrative Process Act, §2.2-4017 of the Code of Virginia and Executive Order 17 (2014), "Development and Review of State Agency Regulations," govern the periodic review of existing regulations. She continued by stating that the Executive Order requires that state agencies conduct a periodic review of regulations every four years.

Ms. Cobb stated that if the Board grants approval for the Department to proceed, the process of periodic review begins with publication of the Notice of Periodic Review in the Virginia Register, which starts a public comment period of at least 21 days, but no more than 90 days. The Department will review the regulations and any public comments, then prepare recommendations for the Board's consideration.

Ms. Cobb concluded by recommending that the Board approve the publication of a Notice of Periodic Review in the Virginia Register for the above-mentioned regulations.

A motion to accept the recommendation was properly made by Mr. Stiff, and seconded by Ms. Jolly. The Department's recommendation was approved unanimously by voice vote.

Items of Interest from the Department of Labor and Industry

Mr. Withrow informed the Board of the Bipartisan Budget Act of 2015, that Congress passed and President Obama signed, which contained a provision to increase OSHA penalties by roughly 78 percent by tying them to Consumer Price Index (CPI) changes. He noted that this provision actually caught OSHA and the state planners by surprise. He added that the last time OSHA penalties were increased was 1991. The penalties were increased at one time and then on an ongoing basis. Since the penalties will

be tied to the CPI, penalties will increase each year as the CPI increases. He stated that Virginia has its penalty level maximums in statute. The OSHA change will take effect on July 1. He added that the Department will be going to the General Assembly this fall to make a statutory change. He noted that the Department does not know if it will be able to tie its penalty increase to the CPI.

Commissioner Davenport recognized the various staff members in attendance at the meeting. He informed the Board that the governor's budget did contain three positions on their compliance side of Occupational Safety and Health and two on the wage compliance side. The Commissioner stated that the Department is hopeful that there will be some additional funding for the Department's staffing needs.

He also reminded the Board of last year's OSHA reporting requirements legislation and the legislation that the Department re-submitted because a drafting error. He announced that the legislation has been corrected to mirror OSHA's requirements, passed both houses of the general assembly, and the Governor's signature is expected soon.

Commissioner Davenport also called the Board's attention to a proposal to have the Department's penalties and fines also apply to public sector employers. The proposal was originally submitted in 2007, but defeated. The Department resubmitted it this year. It directs the Commissioner of Labor and Industry and the Safety and Health Codes Board to adopt regulations on enforcing OSHA programs applicable to employees in the Commonwealth, its agencies, institutions, political subdivisions or any public body. The payment of such penalties is negotiated sums in lieu of such penalties and deposited in the Treasury of the Commonwealth. Currently, this legislation has passed the House and the Senate and is currently on the floor of the House. He added that he hopes it will pass and go forward to the Governor for signature within the next few days.

Items of Interest from the Department or from the Board

There were no items of interest from the Board.

Adjournment

There being no further business, a motion was made by Mr. Parsons and properly seconded by Mr. Stiff to adjourn the meeting. The motion was carried unanimously by voice vote. The meeting adjourned at 12:13 p.m.